In The

Supreme Court of the United States

October Term, 1984

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for A Writ of Certiorari To the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE STATE OF MAINE AND THE MAINE PUBLIC UTILITIES COMMISSION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.

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LIST OF PARTIES

People of the State of California and the Public Utilities Commission of the State of California

Virginia State Corporation Commission

Federal Communications Commission and United States of America

North American Telephone Company

Florida Public Service Commission

State of Michigan and Michigan Public Service Commission

Department of Public Utility Control of the State of Connecticut

National Association of Regulatory Utility Commissioners

Southern Pacific Communications Company

Public Service Commission of the District of Columbia

Public Utilities Commission of Ohio

Arkansas Public Service Commission

Kansas State Corporation Commission

GTE Service Corporation

Public Service Commission of Wyoming

Continental Telecom Inc.

Washington Utilities and Transportation Commission

United Telephone Systems, Inc.

Department of Public Service of the State of Minnesota

Arizona Corporation Commission

Cincinnati Bell Inc.

Citizens of the State of Florida, Office of Public Counsel

National Association of State Utility Consumer Advocates

Consumer Advocate of South Carolina

Office of Consumers' Counsel for the State of Ohio

Iowa State Commerce Commission

Public Service Commission of Wisconsin
Public Service Commission of West Virginia
New York State Department of Public Service
The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
The Diamond State Telephone Company
Indiana Bell Telephone Company, Incorporated
Michigan Bell Telephone Company
The Mountain States Telephone and Telegraph Company
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
Northwestern Bell Telephone Company
The Ohio Bell Telephone Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company
Bell Telephone Company of Nevada
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph Company
The Southern New England Telephone Company
Southwestern Bell Telephone Company
Wisconsin Telephone Company
Board of Public Utilities of New Jersey
Louisiana Public Service Commission

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INTEREST OF THE STATE OF MAINE AND THE MAINE PUBLIC UTILITIES COMMISSION

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The State of Maine regulates intrastate telephone service in Maine by delegating regulatory authority to its Public Utilities Commission. Me.Rev. Stat. Ann. Tit. 35. §§ 1, 4, 15(13), 51 *et seq.* The order of the FCC* which is the subject of this proceeding purports to preempt the states in the determination of proper rates of depreciation

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* Amendment of Part 31, Memorandum, Opinion, and Order, 92 FCC 2d 864 (Jan. 6, 1983).

to be used in setting rates for intrastate service, a function within the jurisdiction of the Maine PUC. Neither the State of Maine or the Maine PUC were parties to the proceedings below and therefore may not join the Petition for Certiorari filed by California, 15 other states, and the National Association of Regulatory Utilities Commissioners. However, the Maine PUC became actively interested in the issues raised in the petition when it was made a defendant by New England Telephone and Telegraph Company in an action seeking enforcement of the FCC order which is the subject of this petition. *New England Telephone Company v. Maine Public Utilities Commission,* Order Denying TRO, 565 F.Supp. 949 (D. Maine); Order Granting Permanent Injunction, 570 F.Supp. 1558 (D.Maine); *rev'd* 742 F.2d 1 (1st Cir. 1984); *cert. pending,* Docket 84-900.

SUMMARY OF ARGUMENT

This is the first case in which the FCC has preempted state regulatory authority based on the concern that a federal purpose may be threatened by the *amount* of intrastate revenues for telephone companies approved by state regulatory commissions. This direct concern with the amount of intrastate revenues is prohibited by 47 USC §§ 152(b) and 211(b) and is tantamount to the reinstatement of the *Shreveport* doctrine in the Communications Act despite clear legislative intent to the contrary.

ARGUMENT

The Communications Act Prohibits The FCC From Administratively Preempting State Regulatory Authority Based On A Finding That The Amount Of Intrastate Revenues Authorized By State Regulatory Commissions Threatens A Federal Purpose.

The FCC has broad authority to preempt certain aspects of state regulation of the telephone industry. However, what distinguishes the present case from all others preceding is that the FCC has preempted state authority based on a direct and expressly stated concern over the *amount* of intrastate revenues. This line has never before been crossed. Once crossed, it is difficult to understand how the impact can be contained because there is no apparent basis for distinguishing depreciation as a class of expense from any other component of a telephone company's intrastate revenue requirement.*

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* In fact, the economic literature makes clear that depreciation and return on equity are inter-related concepts. Kahn states that "any economic discussion of depreciation should really consider it along with the return on investment." Kahn, *The Economics of Regulation,* New York (1970) Vol. I, page 32. At least two courts have already had to consider the issue of whether the FCC's January 6 preemption order would also prohibit states from adjusting the return on equity to reflect the new depreciation policy. The two courts reached opposite results. Compare *New England Telephone Company v. Public Utilities Commission of Maine,* 579 F. Supp. 1356 (D. Maine 1984) with *South Central Bell Telephone Company v. Louisiana Public Service Commission,* 570 F. Supp. 227 (M.D. La. 1983) Aff'd 744 F.2d 1107 (5th Cir. 1984).

Such a result, as the dissent of Judge Widener points out, completely writes Sections 152(b)* and 221(b)** out of the Communications Act. 737 F.2d at 398. The legislative history of the Communications Act makes clear that these sections were enacted to overrule the holding of *Houston, East and West Railway Company v. United States*, 234 U.S. 342 (1942) (the *Shreveport* rate case) for communi-

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* Section 152(b) reads, in part, as follows:

> [S]ubject to the provisions of Section 301 of this title, nothing in this Act shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire . . . of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier . . . .

** Section 221(b) reads, in part, as follows:

> Subject to the provisions of Section 301, nothing in this Act shall be construed to apply, or to give the [Federal Communications] Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire . . . telephone exchange service . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

cation carriers.* In the *Shreveport* case, this Court held that the ICC could control rates charged for exclusively local service where intrastate rates created an unreasonable burden on interstate commerce.

What the FCC has attempted in this case is tantamount to reinstating the holding of the *Shreveport* rate case in the regulation of the communications industry. The FCC has concluded that the telephone companies do not generate adequate revenues on intrastate operations because of depreciation policies followed by most states, and that this inadequacy in the amount of intrastate revenues may interfere with its policies. This direct concern with the amount of intrastate revenues is expressly stated in the FCC's Order. The FCC described depreciation as a "significant portion of the revenue requirement of regulated telephone companies," and continued:

> Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the continual evolving competitive telecommunications market.

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* Hearings on S. 2910 before the Senate Committee on Interstate Commerce. 73d Cong. 2d Sess. 153, 155, 178 (1934); Hearing as H.R. 8301 before House Committee on Interstate and Foreign Commerce, 73d Cong. 2d Sess. 70, 134 (1934); 78 *Cong. Rec.* 8823 (1934); *North Carolina Utilities Commission v. F.C.C.*, 537 F.2d 787, 793 (4th Cir. 1976) (NCUC I); *North Carolina Utilities Commission v. F.C.C.*, 552 F.2d 186 (4th Cir. 1977) (NCUC II). *Computer and Communications Industry Ass'n v. F.C.C.*, 693 F.2d 198, 216 n.99 (D.C. Cir.), *cert. denied*, 103 S.Ct. 2109 (1983). (See Petition for Certiorari, at 14,15.)

Amendment of Part 31, *Memorandum Opinion and Order,* 92 FCC2d 864 (January 6, 1983), Paragraph 37.

None of the cases relied upon by the Fourth Circuit sanction FCC preemption based on a finding that intrastate revenues are inadequate. In *North Carolina Utilities Commission v. F.C.C.,* 537 F.2d 787 (4th Cir. 1976), *cert. denied* 429 U.S. 1027 (1976) (NCUC I) and *North Carolina Utilities Commission v. F.C.C.,* 552 F.2d 186 (4th Cir. 1977) *cert. denied* 434 U.S. 874 (1977) (NCUC II), the Fourth Circuit upheld FCC preemption over the interconnection of customer provided equipment. In *Computer and Communications Industry Ass'n v. F.C.C.,* 693 F.2d 198 (D.C. Cir.). *cert. denied* 103 St. Ct. 2109 (1983) (Computer II), the D.C. Circuit upheld FCC preemption over the tariffing of new terminal equipment based on the F.C.C.'s conclusion that authority over jointly used facilities was essential to effectuate its policies. Both of these cases were based on the conclusion that it was impossible for telephone companies to comply with both federal and state regulatory schemes. Further, in both cases the federal purpose was unrelated to matters of state concern, the need for national uniformity was strong, and the impact on state regulation was considered indirect and unavoidable. In the latter case, the D.C. Circuit expressly recognized the barrier created by 152(b) and 221(b) and the legislative history underlying them and justified the more narrow holding in that case by observing:

> In Computer II the Commission has neither attempted to set rates for intrastate communications service or facilities nor asserted jurisdiction over matters of state concern because of intrastate discrimination against interstate business.

693 F.2d at 216; *Id.* n. 99.

The Fourth Circuit also cites ***Fidelity Federal Savings and Loan Co. v. de la Cuesta,*** 458 U.S. 141 (1982) as support of its high degree of deference to agency determinations in reviewing administrative preemption. However, this Court expressly recognized the limit beyond which administrative preemption may not be sanctioned:

> When the administrator promulgates regulations intended to preempt state law, the court's inquiry is similarly limited: If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it ***unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.***

Id. at 154, [Citation omitted, emphasis added.]

That limit is reached in this case. The FCC's January 6 preemption order is in direct conflict with Sections 152(b) and 221(b) and the legislative history underlying them. The Fourth Circuit's decision does not address the legislative history of Sections 152(b) and 221(b) nor does the text give any indication that it was considered. If the FCC can preempt state depreciation policy if it finds that intrastate revenues based on that policy are inadequate and therefore threaten a federal purpose, it is hard to understand why it could not set other elements of the revenue requirement (such as the rate of return) or the rate itself based on a similar finding. However, this is exactly what Sections 221(b) and 152(b) prohibit.

CONCLUSION

For these reasons, the State of Maine and the Maine Public Utilities Commission urge that this Court issue a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit.

DATED: January 15, 1985

Respectfully submitted,

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